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IN THE SUPREME COURT OF THE STATE OF UTAH

IN RE: UTAH STATE BAR Petitioner.	PETITION TO AMEND RULES GOVERNING ADMISSION TO INCREASE THE BAR EXAM PASSING (CUT) SCORE

INTRODUCTION

The UTAH STATE BAR (the "Bar") by and through its General Counsel, files this Petition to Amend the Rules Governing Admission to the Utah State Bar to raise the current passing score (or the "cut score") of 130 [260] in a two-step process.[1] The proposal is to raise the current score to 133 to be effective for the February 2006 Bar Examination and a year later, increase it to 135 to be effective for the February 2007 Bar Examination. If approved, the increased 133 score will be equivalent to a score of 266 and the increased 135 score will correspond to a score of 270.

[1] Although this petition will at times characterize the passing (or cut) score as 130, 133 and 135 for ease of current comparison as well as historical reference, more accurately speaking the current passing or cut score is 260 as adopted by the Court in 2003 in the comprehensive revision of the Rules Governing Admission.

Utah's current cut score is among one of the lowest in the nation. Thirty-nine (39) other states have higher pass/fail scores and only two states (Alabama and South Carolina) have lower standards. Moreover, Utah's current score of 130 [260] falls five points below the national average of 135 [270]. One of the most important purposes of a bar examination is to protect the public. The Admission Committee and the Board of Bar Commissioners (the "Commission") believe that setting the passing threshold at a somewhat higher level will afford more protection to members of the public by helping to eliminate unnecessary risks and ensuring that applicants possess an acceptable level of knowledge, skill and judgment.[2] In order to be fair, a cut score needs to be high enough to protect the public but not so high as to be unreasonably limiting to applicants. The Bar believes a passing standard of 135 is not only fair but more consistent with national standards. By raising the passing score in order to establish a more meaningful threshold of minimal competency, we will help curtail the widening gap between Utah's score and the national average score. (A redline version of the proposed rule change is attached in the Addendum as Exhibit "1".)

I. BACKGROUND

1. A Short History of Utah's Bar Examination Format and the Passing Score

In 1991, this Court approved changing the format and scoring of the Bar Examination ("Bar Exam") pursuant to recommendations of a special admission evaluation committee ("Evaluation Committee") charged with conducting a

[2] Other components of the admission process, such as character and fitness requirements, are designed to protect the public in other ways.

comprehensive review of the Rules Governing Admission and the examination.[3] Prior to the format change, the Bar Exam was conducted over a three-day period. Two of those days consisted of 18 essay questions and a third day was devoted to multiple choice questions on the nationally administered Multi-State Bar Examination ("MBE"). In order to pass the three-day Bar Exam, an applicant needed to pass 12 of the 18 essay questions and achieve a minimum score of 125 on the MBE. If an applicant failed one portion, he or she was only required to re-take the failed portion. Beginning in 1988, a passing score on the new Multi-State Professional Responsibility Examination ("MPRE") was also required in order to qualify for admission.

In recommending various changes to the Commission, the Evaluation Committee first looked at what other states were doing and concluded, based on recommendations from the National Conference of Bar Examiners ("NCBE")[4] and after conducting its own study, that a majority of other jurisdictions throughout the

[3] Pursuant to the Court's direction, the Commission asked the Honorable David K. Winder, chair of the Bar Examiners Review Committee, to appoint an *ad hoc* special Admission Evaluation Committee. The Committee was comprised of the following: Dennis V. Haslam, Anne M. Stirba, Elliott J. Williams, Brooke C. Wells, Lee E. Teitelbaum, Associate Dean of the University of Utah College of Law (now the S.J. Quinney College of Law), H. Reese Hansen, Dean of the Brigham Young University J. Reuben Clark School of Law, Judge Winder and finally, Michele G. Roberts, the Bar's Admission Administrator.

[4] The NCBE was formed in 1931 as a nonprofit corporation. The mission of the NCBE is to work with other institutions (primarily bar admission authorities) to develop, maintain and apply reasonable and uniform standards of education and character and fitness for eligibility for admission to the practice of law. The NCBE is also charged with assisting bar admission authorities by providing standardized examinations of uniform and high quality for the testing of applicants, disseminating relevant information concerning admission standards and practices, conducting educational programs for the members and staffs of such authorities, and providing other services such as character investigations and conducting research. In addition, the NCBE issues a Code of Recommended Standards for Bar Examiners ("Code") and a yearly Comprehensive Guide to Bar Admission Requirements ("Guide") in conjunction with the ABA and the Association of American Law Schools. The recommended standards, while not binding on bar associations, represent the results of accumulated study and experience of a number of lawyers, examiners, and teachers of high standing. The standards set forth in the Code are offered for guidance and assistance and to help promote uniformity of objectives and practices in bar admission authorities throughout the United States.

United States were in the process of adopting (or already had adopted) a two-day examination format. In order to accommodate an abbreviated testing schedule, most jurisdictions had reduced the number of essay questions. Other jurisdictions also were requiring applicants to pass both portions of the test, that is, re-take both portions if they failed one section. Utah soon followed suit after court approval of a number requested modifications in the admission's process and a two-day testing format was instituted. The current passing score of 130 [260] was also adopted at that time.

Although information related to the history and the setting of the passing score is rather sparse[5], it appears that a significant aspect of the rationale underlying changes in 1991 was based on replicating the average passing percentage of Utah applicants. It is also apparent that the Evaluation Committee clearly contemplated the possibility of increasing the passing score in the future after determining a new pass/fail standard. The thinking was that public perception would be more favorable towards raising a passing score in the future than lowering it. Minutes from the October 24, 1989 Evaluation Committee meeting reflect that after much study, the Evaluation Committee preliminarily concluded that, "[T]he standard deviation method for scoring and combining should [be] used. A passing score will be determined after data from NCBE is

[5] Between 1958 and 1973, according to Justice Henroid in his concurring dissent in *In re Sherri R. Guyon*, Slip Op. Nos. 14920-23 and 14949 (Utah 1977), *petition for rehearing denied*, approximately seven and one half percent (7½%) of all applicants failed. Put another way, approximately 92.5% of all Utah applicants passed. A notable departure from the average occurred with the 1973 examination which resulted in a 40% failure rate. Another notable exception subsequently occurred in 1976 where 179 applicants sat for the examination (the year that the MBE was incorporated into the test) and 145 were eventually deemed to have passed which resulted in a 79% pass rate. Pass rates for Utah's Bar Exams between 1993 and February 2004 are attached as Exhibit "2" in the Addendum. Those statistics reflect a 86.7% overall passing rate which includes first time and repeat examinees.

received and reviewed. This passing score will be in the range of 125-135". With this information in mind, the Evaluation Committee believed that "an appropriate passing score could be determined based on reports from NCBE *showing the passing percentage of applicants* based on scaled score requirements of 125, 128, 130, 132 and 135" (emphasis added). Attached as Exhibit "3" in the Addendum is a copy of the Evaluation Committee's October 24, 1989 minutes.

The Evaluation Committee's final proposed 130 cut score as adopted by the Commission and later approved by the Court was as follows:

> The committee recommends the pass/fail line be set at a scaled score of 130 in substitution of the present requirements of 125 or the proposed 132. It was the committee's viewpoint that there was no justification for failure of approximately 25 percent of the applicants (as would happen at 132). The chart entitled "Comparative Date: Cut-off Points and Passing Percentages" included in these materials indicates that *accepting a scaled score of 130 as the pass/fail line would give us a passing percentage of approximately 84 percent. The committee felt public perception would be more favorable towards raising the scaled score requirement if necessary in the future than lowering it* (emphasis added).

See copy of December 15, 1989 Evaluation Committee proposal to the Commission attached as Exhibit "4" in the Addendum.

2. <u>The Admission Committee's Recommendation and the Commission's Current Decision to Raise the Passing Score.</u>

Several veteran members of the Admission Committee ("Committee") have long expressed their concerns over Utah's comparatively low cut score. In light of the movement towards raising the cut score in other states, and based on recommendations by NCBE and other experts that jurisdictions do periodic reviews of their admission standards, the Committee undertook a study, which

included, in part, reviewing the recent reports relating to raising the score in Florida, Minnesota, New York and Ohio. The Committee also reviewed and discussed written evaluations of those studies as described below. After its review, the Committee concluded that its options were to: (a) maintain Utah's current cut score of 130 [260]; (b) hire an experienced expert in the field, *i.e.*, a recognized psychometrician experienced in the bar examination field, to conduct an analytical study of the current cut score at a considerable cost and additional delay; [6] or (c) rely upon the studies by the aforementioned states and the current national average of 135 to recommend that Utah's cut score be revised accordingly. Like those recognized individuals involved in the national bar admission matters, current Committee members expressed their conviction that any passing threshold should not be tied to a percentage of those passing, but rather should be a score reflecting minimal competency.

The Committee also entertained two different approaches if the cut score increase were to be approved. The first was a proposal to raise the score to 135 immediately after Commission and Court approval, if given. The second proposal was to increase the cut score in two steps a year apart, much as Florida has done. After a thorough study of the underlying materials and considerable discussion, the Committee voted to recommend raising the score to 135 in a two-step process. [7]

[6] Estimates of the cost of such a study range from $50,000 to $150,000 (which includes the necessary staff time to help administer the project).

[7] The Committee has 14 voting members plus five non-voting ex-officio members. Eight members voted to raise the passing score to 135 and one member was opposed. Of the ex-officio members, one was in favor of raising the passing score and two were opposed. There were seven votes in favor of implementing the

The Committee then provided the Commission with materials including the recent studies from Florida, Minnesota, New York and Ohio as well as published reviews of those studies (which are contained in the Appendix attached to this petition), for a regularly scheduled meeting in June of 2003. Chief Justice Christine M. Durham was in attendance at the Commission meeting during the admission discussion. Steven T. Waterman and Judge James Z. Davis (co-chairs of the Committee) as well as Joni Dickson Seko (the Bar's Deputy General Counsel in Charge of Admissions) appeared at the meeting to present the Committee's proposal to raise the cut score and answer questions. The Committee's recommendation to raise the passing score was rooted in concerns about minimal competency and protecting the public and also supported by current higher cut scores in an overwhelming majority of other jurisdictions. In making its recommendation, the Committee relied on the recent studies underlying cut score increases in other states, as well as its reluctance to expend large sums of money on a separate independent study.[8] After considerable discussion, the Commission delayed taking a vote until a scheduled meeting where both Dean Scott M. Matheson and Dean H. Reese Hansen could be present and articulate their arguments against raising the passing score.

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two-step process to raise the score to 135 with two voting members opposed. Of the ex-officio members, one was in favor of the two-step implementation process and two were opposed.

[8] One of the primary reasons for not endorsing an independent study was that the conclusions reached by an experienced and approved expert in this field were unlikely to produce different recommendations than the Florida, Minnesota, New York and Ohio studies recommended. The other reasons were that the delay was likely to be lengthy and that the cost would be significant as well as unwelcome in light of the Bar's growing budget concerns.

Consequently, the vote was postponed until the Commission's August 2003 meeting.

Ms. Seko provided additional documentation to the Commission for the August 22, 2003 meeting, and again, both she and Steve Waterman attended the meeting to answer questions and facilitate discussion. As was the case in Florida as well as other jurisdictions where academicians, *i.e.*, law school deans, were opposed to raising the passing score, Dean Hansen and Dean Matheson voiced their concern.[9] During the Commission meeting, long-time Admission Committee member and current Bar Commissioner Russell Vetter recalled that in 1991, when Utah's cut score was modified in conjunction with the new testing format, the NCBE had opined that by combining the scores on the essay and MBE portions of the Bar Exam, a predictable "bump" or increase in the number of successful applicants would occur. Mr. Vetter observed that by raising the cut score now, the Bar would be merely taking corrective measures to offset the previous "artificial bump". Interestingly, it may very well be that the predicted "bump" has occurred in that while the Evaluation Committee deemed the overall passing average in Utah to be 84% (see Addendum at Exhibit "4"), since adoption of the 130 standard the average passing score appears to be 86.7% (see footnote 5 and Exhibit "2" in the Addendum).

At the conclusion of the discussion at the August meeting at which Associate Chief Justice Matthew B. Durrant was present, the Commission voted

[9] See pages 40-41 of the Florida Board of Bar Examiners Report for a summary of the objections from that state's law school deans which is attached in the Appendix at Exhibit "1" See also the Appendix at Exhibit "2", which contains a memo to the Commission from Dean Matheson and Dean Hansen setting forth their views.

to approve raising the cut score to 133 [or 266] to be effective for the February 2006 Bar Exam and then raise it to 135 [or 270] to be effective for the February 2007 Bar Exam.[10]

II. DISCUSSION

It is useful to bear in mind that there always is a certain degree of unavoidable arbitrariness relating to setting a passing score for any professional examination. Historically, the Bar has recognized this fact. For instance, pursuant to minutes from an October 24, 1989 Evaluation Committee meeting (see Addendum at Exhibit "3"), the Committee noted: "*there are several costly and time consuming methods for trying to fairly determine the appropriate passing score but all literature acknowledges that finally the decision is arbitrary*" (emphasis added). The underlying purposes of a sufficiently high cut score on Utah's Bar Exam, *i.e.*, minimal competence and the responsibility to protect members of the public, however, are compelling and should ultimately outweigh concerns that a passing score is incapable of the elusive objective of unquestionable precision.

The NCBE Code Recommendation IV (Bar Examinations) 18 (Purpose of Examination) echoes these goals:

> The bar examination should test the ability of an applicant to identify legal issues in a statement of facts, such as may be

[10] The vote was six to four: President Debra J. Moore and President-elect N. George Daines as well as Commissioners Robert L. Jeffs, V. Lowry Snow, David R. Bird, and E. Russell Vetter were in favor; Felshaw King, Augustus G. Chin, Yvette Diaz and Stephen W. Owens were opposed; public member Mary Kay Griffin abstained from voting and three voting Commissioners were absent from the meeting (Nathan D. Alder, Karin S. Hobbs and D'Arcy Dixon Pignanelli). The two law school deans are ex-officios and thus not voting members of the Commission. The vote occurred approximately a year ago and the proposed dates of July 2004 and July 2005 were actually designated at that time. The intention, however, was to schedule the cut score increase in a two-step process a year apart in order to give the law school students adequate notice.

> encountered in the practice of law, to engage in a reasoned analysis of the issues and to arrive at a logical solution by the application of fundamental legal principles, in a manner which demonstrates a thorough understanding of these principles. The examination should not be designed primarily to test for information, memory or experience**. Its purpose is to protect the public,** not to limit the number of lawyers admitted to practice (emphasis added).

A recent Florida Supreme Court decision is also in accord. That court issued an opinion in 2003 which approved raising the examination's passing score from 131 to 136 in a two-stage process. The Florida Board of Bar Examiners ("Florida Board") conducted two independent studies of that jurisdiction's pass/fail line and petitioned the court for the change. Although the Florida Board's recommendation was not unanimous (the cut score increase was opposed by the deans of the Florida law schools and other law school related professionals), the court approved the amendments to ensure that applicants possessed a minimum and acceptable technical and educational competence as follows:

> The Florida Board of Bar Examiners, as the administrative arm of this Court charged with the task of establishing and maintaining responsible admission requirements [citation omitted], has been delegated the important responsibility of safeguarding the interests of all Floridians. This serious responsibility stems from the recognized principle that an attorney licensed to practice law in this state is capable of both rendering tremendous good, but is also in a position to inflict harm if care and caution are not implemented. **The members of [t]he Florida Bar, by their very nature as attorneys, are licensed to become intimately involved in the lives and matters of clients, and anything less than exacting standards of admission exposes Floridians to unacceptable risks. Thus, before the Board can recommend to this Court that an applicant be admitted to the Bar, it must be confident that the person is qualified with regard to both character and fitness, and also possesses a certain minimum technical and educational competence** (emphasis added).

Amendments to the Rules of the Supreme Court Relating to Admissions to the Bar, 843 So. 2d 245, 246-7 (Fla. 2003). A copy of the opinion is attached as Exhibit "5" in the Addendum.

As noted in the introductory section, Utah's current cut score is among one of the lowest in the nation. Raising the score to a fair and reasonable standard will afford more protection to members of the public by helping to ensure that applicants possess minimal proficiency. The following discussion is organized into five sections:

1. Current Cut Scores in Other Jurisdictions;
2. Dr. Stephen P. Klein;
3. Recent Cut Score Studies;
4. Review and Criticism of Klein Studies; and
5. Alleged Impact on Minority Applicants.

1. CURRENT CUT SCORES IN OTHER JURISDICTIONS

Ultimately, one way to gauge how effectively a bar examination cut score is in achieving its important purposes is to compare it with other states' scores. During the past decade, over a dozen states have raised the score they require for passing the examination. Those states include Arizona, Florida, Georgia, Illinois, Kansas, Maine, Mississippi, Nebraska, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, Texas and Wisconsin. Some of these jurisdictions may, in part, have been motivated by concerns about possible score inflation on the MBE. Inflation could incur with this test if students receive more practice in taking multiple choice tests in law schools or if intensive examination instruction

in bar preparation courses are able to raise MBE scores without a corresponding improvement in applicants' skills and knowledge. These two factors would not be corrected by the MBE equating process. Most states which have raised their cut scores have not experienced the drop in passing rates that might otherwise have been projected.[11] One reason may be that higher standards motivate students to be better prepared.

Attached at Exhibit "6" in the Addendum is an equivalency list which reflects the cut scores of other jurisdictions. Because jurisdictions may use slightly different formulas to calculate a cut score, the Bar has prepared this equivalency list in order to meaningfully compare other states' pass/fail scores with Utah's current score of 130.[12] Only two states, Alabama and South Carolina, have cut scores lower than Utah: 128. Six other states have the same score as Utah: 130. The remaining jurisdictions *all* have cut scores higher than Utah.[13] A passing rate expressed as a percentage has Utah at 87% in 2003, as

[11] "Clearing the Bar: How to Set the Standard – Setting Bar Examination Passing Scores and Standards" by Stephen P. Klein, Ph.d., *The Bar Examiner*, Nov. 2001.

[12] Also attached at Exhibit "6" in the Addendum is a chart from the 2003 issue of the "Comprehensive Guide to Bar Admission Requirements" published by the NCBE showing the "raw" cut scores, which, in part, was used in preparation of the Bar's equivalency chart. The accompanying "Grading and Scoring" comments are indicative of why the aforementioned equivalency chart was prepared, *i.e.*, it reflects why on their face, cut scores are not absolute comparatives. Attached also in this exhibit is the 2004 edition of the same chart.

[13] The remaining states do not include Louisiana (which tests on civil code law rather than English common law), Washington (which does not administer the MBE and thus, makes meaningful comparison difficult), and Wisconsin (which tests an insignificant number of applicants because it largely admits lawyers via Wisconsin diploma privilege). Florida's cut score as noted above has been increased since the equivalency chart was prepared. Its placement on the list, while still higher than Utah, is somewhat inaccurate since it should be even higher than is indicated.

reflected in another chart attached as Exhibit "7" in the Addendum.[14] This chart reflects Utah's rank as the highest passing percentage in all U.S. jurisdictions.

Yet another chart reflecting a ten-year summary of bar passing rates for first time as well as repeat test takers from 1994-2003 is attached as Exhibit "8" in the Addendum. This chart, also taken from the May 2004 issue of *The Bar Examiner*, includes all common law jurisdictions (such as the Northern Mariana Islands and Guam) in addition to all United States jurisdictions. An overall ten year summary passing rate is shown as 64%, with first time examinees passing the examination at a 75% rate. The chart shows that next to Palau, Utah has the highest overall pass rate of any jurisdiction during the ten year period, ranging from a low of 84% to a high of 92%. This chart includes applicants who have taken bar exam more than once. Typically, repeated attempts result in lower passing rates. For first time examinees, Utah's pass rates range from a low of 86% to a high of 94% according to the chart.

2. DR. STEPHEN P. KLEIN

Dr. Stephen Klein's credentials as an expert are an important aspect of this petition for several reasons. First, the Bar would prefer to rely on Dr. Klein's current work in this area rather than embark on the costly and more time-consuming route of undertaking an independent evaluation which would produce a very similar, if not an identical result. Second, not all so-called "experts" in this area truly qualify as experts. Dr. Klein is a recognized expert and has extensive and relevant experience, having performed the evaluations underlying the recent decisions to raise the cut scores in Ohio, Minnesota and Florida (New York is still

[14] *The Bar Examiner*, May 2004 edition.

studying the issue of whether to raise its pass/fail score.). Other jurisdictions have relied upon Dr. Klein's expertise in this area to perform periodic reviews of their admission process and he is a frequent consultant on other statistically-related aspects of the bar admission process. In a recent opinion, the Florida Supreme Court described Dr. Klein as "the preeminent national expert on the psychometric characteristics of bar examinations…." 843 So. 2d 245, 247 (Fla. 2003).[15]

Dr. Klein is the senior partner in the consulting firm of GANSK and Associates and in that capacity, has done research and consulted on a wide range of matters for the National Conference of Bar Examiners, more than two dozens state boards of bar examiners, over a dozen law schools, and the Association of American Law Schools. He has consulted for the National Academy of Sciences and many other public and private agencies and organizations. Dr. Klein also is a Senior Research Scientist at the RAND Corporation in California where he has led studies on educational, health, military manpower, and criminal justice issues.

Dr. Klein received his B.S. degree from Tufts University and his M.S. and Ph.D. in Industrial Psychology from Purdue University. Before joining the RAND Corporation in 1975, he was a Research Psychologist with the Educational Testing Service in Princeton and Associate Professor in Residence at UCLA

[15] Other courts have expressed similar confidence in Dr. Klein's abilities. In a 1999 Ohio case on remand - *DeRolph et al. v. State of Ohio et* al., 98 Ohio Misc. 2d 1, 15 (1999); 723 N.E. 2d 123, 134 (Ohio 1999) – where officials failed to create a new school financing system as ordered by the Ohio Supreme Court in order to comply with the mandates of the Ohio Constitution, the court relied heavily upon Dr. Klein's analysis of school funding and performance testing as well as his criticism of the research and methodology performed by the education system's retained expert, Dr. Augenblick. In an exhaustive 150 page opinion,

where he chaired the Research Methods division in the Graduate School of Education. Dr. Klein has over 250 publications, is on the editorial board of the *Review of Educational Research*, and is a member of the American Statistical Association, the American Psychological Association, the American Educational Research Association, and the National Council on Measurement in Education. A copy of Dr. Klein's resume dated January 2000 is attached as Exhibit "9" in the Addendum.

The Bar would prefer to rely on Dr. Klein's recent studies because virtually all potential criticism of a recommendation to raise the cut score is predictable, and conducting yet another study simply will not affect the already established arguments in opposition.

3. RECENT CUT SCORE STUDIES

Attached respectively as exhibits in the Appendix, are copies of evaluative studies concluding that Florida's (Exhibit "3"), Minnesota's (Exhibit "4"), New York's (Exhibit "5") and Ohio's (Exhibit "6") cut score should be raised. Included with the Florida study are copies of pertinent pages from the Florida Board of Bar Examiners' report summarizing the study and recommending the change. Also respectively attached as exhibits in the Appendix are copies of: (a) an article by Deborah Merritt, Lowell L. Hargens and Barbara F. Reskin (the "Merritt Critique") published in 2001 which criticizes Klein's studies to raise the cut score (Exhibit "7"); (b) a 2002 review by William A. Mehrens (the "Mehrens Review") evaluating Klein's study to raise the New York State cut score and analyzing the Merritt

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the court gave "great weight to the testimony of Dr. Klein … and the substantial, credible criticism of Dr. Augenblick's methodology". Id. at 100, 190.

Critique (Exhibit “8”); and (c) a review by Michael T. Kane (the “Kane Review”) issued in 2000 analyzing Klein’s study to raise the Minnesota cut score (Exhibit “9”). The Kane Review also includes Klein’s response and Kane’s rebuttal to that response. The following is a brief summary of these materials:

(a) *Florida*: The 1999 Florida report (Appendix at Exhibit “3”) presents the findings of an evaluative study that examined where Florida should set the cut score for its bar examination. One aspect of the study was based on standards that designated exam graders used on a regular basis and the second aspect involved a group of 28 “external” panelists which included law professors, attorneys and judges. Both groups (the graders and the external panelists) eventually agreed that Florida’s standard of 131 was “well below the level that should be required for passing”. The report contains several clearly labeled sections pertaining to methodology and the results. Of particular note is Dr. Klein’s conclusion in the report addressing the concern that when a jurisdiction’s cut score is raised, it automatically reduces the number of passing applicants:

> It is not possible to confidently forecast what would happen to Florida’s bar passage rate if the score required for passing is raised 4 or 5 points. One reason it is not clear what would happen is that other states have found that applicants respond to an increase in standards by improving their preparation for the exam. Thus, the passing rate under a higher standard is greater than what would be expected on the basis of current data.

(Appendix at Exhibit “3” on p. 4.) Also of particular interest is Dr. Klein’s conclusion is that raising a cut score does not affect what courses applicants take in law school or what topics they study for the exam. Thus, in his opinion, students only need about a six to 12 month notice of a change. (*Id.* at p. 5.)

(b) *Minnesota*: The 1998 Klein study in Minnesota (Appendix at Exhibit "4") used a very similar methodology to the Florida study except that the panelist section was larger: 36 external members compared to Florida's 28 external panelists. Regular exam graders were also involved in the study. The statistical analysis and report's conclusions are nearly identical to those of the Florida's study.

(c) *New York*: This 2002 Klein study found in the Appendix at Exhibit "5" is, not surprisingly, also similar to those conducted in Florida and Minnesota. One panelist group was comprised of 30 external members representing practicing lawyers, judges and academicians and the other group consisted of experienced exam graders. The New York cut score currently is slightly below the national average and the report concludes that raising the passing threshold is a reasonable and supportable action to take. As of the date of submission of this petition, New York has not yet raised its cut score.

(d) *Ohio*: Dr. Klein's 1996 study in this jurisdiction attached in the Appendix at Exhibit "6" used experienced bar exam graders and 29 external panelists in a familiar methodology. The report's conclusions were that Ohio's cut score was well below the level of performance that should be required for passing. Dr. Klein recommended that Ohio might want to consider raising the score it required for passing, which it subsequently did. That jurisdiction now has an equivalent cut score of 135. Of note, before Ohio raised its cut score, its mean MBE score was well below the national average on every exam, but since

raising its overall passing score, its mean MBE score has been at or above the national average.

4. REVIEW AND CRITICISM OF KLEIN STUDIES

Criticism of the Klein studies supporting a decision to raise a cut score can be broken down into two main categories: (1) criticism of Klein's methodology; and (2) social policy reasons such as concerns about anti-competition or lack of diversity within the legal profession which are unrelated to a specific evaluative process. Included with this petition and summarized below are copies of: (a) the Merritt Critique (Appendix at Exhibit "7"); the Mehrens' Review (Appendix at Exhibit "8"); and the Kane Review (Appendix at Exhibit "9").

(a) *The Merritt Critique*: The Merritt article[16] contains both the aforementioned categories of criticism. This law review article opines that a decline in bar passage rates has serious implication for both individual applicants ("may bring unemployment, a deep sense of professional failure and financial insecurity") and the public ("because it reduces the number of attorneys and thus raises the price of legal services"). Merritt also asserts that raising a cut score may diminish the quality of new lawyers ("heightened bar passage standards may distract new lawyers from developing essential skills like alternative dispute resolution") and in addition, "may threaten the diversity of the legal

[16] *Raising the Bar: A Social Science Critique of Recent Increases to Passing Scores on the Bar Exam,* 69 Cincinnati Law Review 929 (2001). Deborah J. Merritt is a law professor and adjunct professor of sociology as well as Director of the John Glenn Institute for Public Service and Public Policy at Ohio State University ("OSU"). Co-authors Lowell L. Hargens and Barbara F. Reskin are also professors of sociology at OSU.

profession….since historically, minority test takers fail the bar exam at a higher rate than do white examinees". The authors also allege that Klein (whom they admit "is a frequent consultant and recognized expert in the bar examination field" and . . . much of his work has been excellent"[17]) has developed a methodology which "suffers from a fundamental flow that produces an arbitrary passing score" and further, "the process may mislead bar examiners, supreme court justices, and the public by falsely suggesting that the state has adopted a scientifically defensible passing score."[18]

Merritt's primary criticism of Klein's evaluative process appears to center on the way he uses judgments (by bar exam graders and other panelists) about answers to individual essay questions to predict performance on the bar exam as a whole. Or put another way, "…Klein essentially used recognized methods to develop cut scores for each of the individual essays he reviewed. The flaw in his technique lies in the way he combined these individual cut scores to generate an overall passing rate."[19] The article also asserts the number of graders and panelists employed in the study is insufficient and states that more training should have been given, especially among the law professors who participated. Much of Merritt's criticism is addressed by Klein in his response to the Kane Review criticism (see Exhibit "9" in the Appendix) as well as by the Mehrens' Review (see Exhibit "8" in the Appendix). Other concerns are addressed in the previously referenced Florida opinion.

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[17] Merritt article on page 4, footnote 9 (Appendix at Exhibit "7").

[18] See generally Merritt article (Appendix at Exhibit "7").

[19] Merritt article on p. 18, footnote 12 (Appendix at Exhibit "7").

(b) *The Mehrens' Review*: Dr. William A. Mehrens[20] reviewed the Merritt article as well as Dr. Michael Kane's criticism of Klein's work (a summary of which subsequently follows). Dr. Mehrens concludes that Klein's approach on evaluating a state's passing score is "well conceptualized and well conducted" and that it meets acceptable industry standards. Mehrens summarized his findings, in part, as follows:

> Although I am basically in support of the processes used in the studies, there are a few things I would have done a bit differently. This is bound to be true. Standard setting is not an area where there is complete agreement across professionals regarding the best method. Indeed, the AERA/APA/NCME *Standards for Educational and Psychological Testing* (1999) does not specify any best method to conduct a standard setting.
>
> In summary, Klein's general approach seems to be a sound method for setting standards on the New York Bar Exam. An expert can always find things to criticize in any study. I will mention below some things I might have done a bit differently. My preferences are <u>not</u> necessarily to be perceived by the readers as ones that would result in a better approach. (Emphasis in original.)

Mehrens' analysis of the Merritt criticism is interesting in that he concludes that Merritt is philosophically opposed to raising passing scores on bar examinations in general and therefore, that analytical criticism is rooted in this philosophical perspective. Largely, he finds Merritt's criticism irrelevant and not well founded. For example, in response to Merritt's observation that, "Klein's method produces an arbitrary passing score," he responds, "every standard setting does this; it cannot be avoided." He characterizes nearly all the other assumptions Merritt makes as essentially incorrect.

[20] William A. Mehrens is a professor of counseling, educational psychology and special education at Michigan State University. He is an expert on assessment and standardized testing, including "high-stakes" testing, teaching to tests and performance assessment. He is past president of the National Council on Measurement in Education and the Association for Measurement and Evaluation in Guidance.

Mehrens also clearly states that while he personally would prefer some of Dr. Michael Kane's methods, he does not find Klein's methodology inappropriate or inadequate. In analyzing Klein's methods, he concludes that Kane's criticisms are moot or that Kane's (and his) personal preferences are merely that: preferences. Mehrens adds that "an expert can always find things to criticize in any study" and that [mere] "…preferences are not necessarily to be perceived by the readers as ones that would result in a better approach." Perhaps of most interest, Mehrens concludes that while he personally would prefer to use some of Kane's methodology, Kane's methods would, in fact, make an insignificant difference in Klein's evaluative results.

(c) *The Kane Review*:[21] This evaluation of Klein's Minnesota study was conducted by Professor Michael T. Kane, former Professor Emeritus in the Department of Kinesiology, School of Education, at the University of Wisconsin at Madison. Dr. Kane reaches the conclusion that Klein's study had such limitations in design and implementation that he would not rely on the results as a basis for changing Minnesota's passing score. Kane's four primary criticisms are as follows: (1) insufficient panelist orientation and lack of sufficient training; (2) the inadequacy of methods used to derive the passing score; (3) the lack of precision of the passing score; and (4) inadequate documentation of the procedures employed. Several of these criticisms are similar, if not identical, to those found

[21] "Review of the Standard-setting Study of the July 1997 Minnesota Bar Examination" by Michael T. Kane dated August 2000. Dr. Kane states that he relied upon "the report prepared by Steven (sic) Klein and the paper by Merritt, et. al.", and that while he "tried to rely on generally accepted standards for setting passing scores…because the published standards are stated in very general terms, [he] also relied heavily on professional judgment."

in the Merritt criticism.[22] Below is a summary of Klein's response to both Merritt's and Kane's criticisms.

(d) *Klein's Response to the Kane (and Merritt) Evaluation*:[23] In a response letter to the Minnesota Board of Law Examiners commenting on criticisms set forth in both Dr. Kane's and the Merritt law review article's evaluation of his studies, Dr. Klein points out that all participating panelists in the studies were, in fact, given an orientation and provided sufficient training. Significantly, he continues, mean ratings given to essay answers by law professors and judges were no different than ratings assigned by the other panelists although Kane had opined that this group would probably bias the standards upwards. Second, Klein defended the methodology that he used and provided another review by Dr. Barbara Plake of the questioned method which noted that the methodology was consistent with a method used by Dr. Plake and another recognized expert in the field (Dr. Hambleton) called the "Analytical Judgment Method." (Dr. Plake's assessment is attached to Klein's response at Exhibit "9" in the Appendix.) Klein also asserted that while Kane prefers to use one different aspect of the entire approach versus the method Klein used, the

[22] The Merritt paper, which was published in 2001, was provided to Dr. Kane in draft form before it was published.

[23] Dr. Klein's letter dated October 18, 2000 responding to Kane's (and Merritt's) criticism is at the end of the Kane Review attached as Exhibit "9" in the Appendix.

methodologies each prefers produced the same passing score in Minnesota of 270 and thus, it really didn't matter which variation was used.[24]

Dr. Kane also criticized Klein's "lack of precision" which he asserted is inherent in Klein's preferred methodology. Dr. Klein's response is that a certain degree of uncertainty is inherent in *any* standard setting method and that the real issue is what to *do* about the uncertainty (*i.e.*, impose a higher or lower standard than the one derived from the panelists' ratings). Dr. Klein readily acknowledged that in the case of a bar exam, setting the standard too high would result in failing some applicants who should pass. He referred to Dr. Plake's review of his methodology (using Linn and Shepard procedures)[25], however, which noted that Klein's procedures probably err on the side of setting the standard too low rather than too high.

(e) *Kane's Rebuttal Letter to Klein's Response*: In a letter dated November 2, 2000, Dr. Kane states that while Dr. Klein's response addressed some of his concerns, it did not address all of them. The letter describes in more detail those concerns.

5. ALLEGED IMPACT ON MINORITY APPLICANTS

One of the most common assertions raised in the face of a proposal to increase a bar exam cut score is that a higher requirement will have a disparate

[24] In one other state, apparently the Kane approach yielded a slightly higher passing score than the Klein approach. Dr. Plake observed, however, that "the issue is largely a statistical nit pick that doesn't matter, *i.e.*, it has no systematic effect on raising or lowering the passing score."

[25] Klein observes in his response that Linn and Shepard are also nationally recognized experts in this field.

impact upon minorities. In a jurisdiction with a high number of minority applicants taking the examination, the Florida Supreme Court recently concluded that based upon empirical evidence, raising the cut score from 131 to 136 did **not** adversely impact minority applicants. 843 So.2d 245 (Fla. 2003). In examining the charge that increasing the pass/fail line would unfairly disadvantage minority racial groups, the court observed in pertinent part:

> *Hypothetical application of the proposed new passage score has made clear that increasing the pass/fail line would impact all applicants evenly, regardless of gender, race, or ethnicity. Indeed, despite many allegations of such…no data before this Court supports the contention that raising the pass/fail score will adversely impact minority applicants in a manner any different from other applicants.* While it is acknowledged that certain current disparities between racial groups may remain, facts demonstrate to us that such are not a product of the examination or its scoring, and it must be clear to all that the key to diversity and equality in bar admissions is not to be accomplished by promoting unqualified persons to be certified competent contrary to evaluation—indeed, the hallmark of fairness and egalitarianism has always been a commitment to ensuring the recognition of all those who have proven their capabilities, regardless of ethnicity or background.
>
> *…The contention that an increase in the pass/fail line will disproportionately adversely affect minority applicants is simply opinion contrary to present fact. The empirical studies contained in the record before this Court which project the impact of an increase in the admission standard have generated clear statistical data which refutes the claim that minorities will be disproportionately affected, and simply saying that minorities will be adversely affected does not serve to contradict this data in any cognizable fashion.* The hypothetical application of the proposed new passing level to recent bar examinations presents facts to us which demonstrate beyond dispute that the only people disadvantaged by an increase in the pass/fail line would be those who are not qualified to become practicing members of the Florida Bar in the first place, which crosses all populations equally, and there is no evidence of disparate gender, racial, or ethnic impact [footnote omitted].
>
> *…[T]he only discrimination occurring here is that which should occur – differentiation between those candidates qualified to serve*

the public and those who do not possess the minimum competence to practice law, so that we may fulfill our obligations to the citizens of this state.

Id. at 250-1 (emphasis added).

Dr. Klein's Florida report is in agreement with the Florida court's comments: "Analyses …suggests that…change in [passing] rates would apply equally to minority and non-minority applicants. In other words, raising the score for passing by 5 or even 10 points would have no measurable effect (in either direction) on the disparity in bar passage rates that currently exists among racial/ethnic groups."

Compared to most jurisdictions, Utah has a very small number of minority applicants. This fact has significant implications for assembling statistical information and forecasting pass/fail results for minority applicants. First, the smaller the number of minority applicants, the less meaningful and reliable pass/fail statistical conclusions tend to be. Moreover, federal and state law prohibits the Bar from gathering race and ethnic information except by voluntary disclosure which makes the minority applicant pool from which to draw statistical conclusions even smaller.[26] Third, the inherent restraints in privacy laws and the small numbers of minority applicants create a disclosure nightmare for the Bar because for the most part, it would be relatively easy to discern the identity of an applicant who failed an examination in a given year for either the February or

[26] In-state law schools are provided with post-examination information which includes a list of who took the exam and whether that individual passed or failed only if the applicant signed a narrowly tailored "Authorization for Release of Information Regarding Bar Examination Performance". Pass/fail results of individual out-of-state law school applicants are provided only if the applicant has signed the aforementioned release and the law school specifically makes the request. It is the Bar's understanding that

July test. Nevertheless, the Bar compiles non-identifying statistics based on the limited voluntary information it is provided and would produce this information to the Court upon request. Absent empirical evidence that raising the cut score would adversely and unfairly impact minority applicants, the Bar is confident to rely on the findings of Dr. Klein and the Florida Supreme Court that minority applicants would not suffer unfairly if the cut score were raised.

III. PROPOSED RULE AMENDMENT

The Bar's proposal is to revise Rule 11-4 of the Rules Governing Admission as follows:

> **Rule 11-4. Examination Scoring and Passing Grade.** The raw Written Component score is scaled to the MBE portion of the examination using the standard deviation method. The scaled MBE score and the scaled Written Component score are combined. Effective for the February 2006 Bar Examination, an Applicant who receives a combined score of 266 or above passes the examination. Effective for the February 2007 Bar Examination and thereafter, an Applicant who receives a combined score of 270 or above passes the examination.

(A redline version of Rule 11-4 is provided in the Addendum at Exhibit "1".)

IV. CONCLUSION

Ultimately, there is no universally acceptable approach to set a passing score on a bar examination. Moreover, there will always be a degree of uncertainty inherent in any standard setting method and a pass/fail line is incapable of unquestionable precision. Every jurisdiction, however, is charged

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laws not applicable to the Bar permit law schools to compile information related to minority and non-minority student success on the examination. The Bar does not have access to this information.

with the responsibility to see that its standards insofar as it is possible ensure minimal competency among those admitted to practice law in order to protect members of the public. The Bar believes that raising Utah's cut score from 130 to 135 in a two step process is an important aspect of achieving these goals. Moreover, the requested cut score increase is more consistent with the national average and is supported by four independent studies conducted by an experienced national expert in the field of bar admissions. Utah's current cut score of 130 is among one of the lowest in the nation and the Evaluation Committee which recommended the current score clearly contemplated that it might be revised in the future. The Bar respectfully requests the court to grant this petition and revise the rule accordingly.

Dated this ____ day of _____, 2004.

_____
Katherine A. Fox
Utah State Bar General Counsel